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No. 84-1388

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROSA DIBELLO DARVILLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court properly admitted as an overt act of a conspiracy charge evidence of petitioner's attempted distribution of cocaine to undercover law enforcement agents.

2. Whether petitioner was improperly characterized as a "dope dealer" by a law enforcement officer during cross-examination.

3. Whether the trial court properly admitted the out-of-court statements of an alleged co-conspirator without first finding that the government had proven the existence of a conspiracy by independent evidence.

4. Whether petitioner received effective assistance of counsel.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Government of the Virgin Islands v. *Dowling*, 633 F.2d 660, cert. denied, 449 U.S. 960 6

Strickland v. *Washington*, No. 82-1554 (May 14, 1984) 6

United States v. *Continental Group, Inc.*, 603 F.2d 444, cert. denied, 444 U.S. 1032 6

United States v. *Cronic*, No. 82-660 (May 14, 1984) 6

United States v. *Vinson*, 606 F.2d 149, cert. denied, 444 U.S. 1074 5

Statutes and rule:

21 U.S.C. 841(a)(1) 1

21 U.S.C. 846 1

Fed. R. Evid. 404(b) 4

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1984. The petition for a writ of certiorari was filed on February 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 1), and aiding and abetting the distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 2). She was sentenced to concurrent terms of 30

years' imprisonment on each count, a $50,000 fine, and a six-year term of special parole.

1. The evidence at trial showed that in September 1982 two undercover FBI agents, who were posing as partners in a large-scale heroin distribution business, met with petitioner in Cleveland to discuss the possible sale of five kilograms of cocaine. Petitioner advised the agents to expand their business into the cocaine market and gave them a "sample" of 91% pure cocaine. Although petitioner attempted to sell the agents five kilograms of cocaine at $59,500 per kilo, the agents expressed an interest in purchasing only $10,000 worth of cocaine. After telephoning a business associate, petitioner replied that she could not "bust up" a kilo but would accept a deposit of $30,000 until the agents could acquire the remainder of the purchase price for five kilograms. The agents turned down petitioner's offer but took her Florida telephone number in case they desired to transact business with her in the future (Tr. 92-101, 149-150, 224, 226).

In mid-January 1983, the agents telephoned petitioner while they were in Florida on another matter. During the conversation, she arranged to meet with them to discuss the sale of four kilograms of cocaine, but she failed to arrive at the scheduled appointment (Tr. 101, 227-229).

On January 25, 1983, petitioner telephoned one of the agents and asked him to come to Florida to purchase the cocaine. The agent responded that he could not travel to Florida at that time but promised to talk to his partner about her and asked her to call again on the 26th. The next day, petitioner informed the agents that "her people" would not allow her to transport cocaine to Cleveland. The agents then agreed to pick up two kilos of cocaine in Florida the next week. Later in the day, however, petitioner informed them that her husband would arrive in Cleveland

on a United Airlines flight that afternoon. The agents waited at the airport for the particular flight, but the husband did not arrive (Tr. 101-104, 109, 229-232).

The following day, however, the agents learned that the husband would arrive on the same flight as had been planned the day before, and they waited at the airport for his plane. As the husband disembarked and approached the agents, he stated, "I'm here from Rosa." He then gave the agents a brown suitcase, and the group proceeded to a local hotel. After he removed two kilos of cocaine from the suitcase, he was arrested (Tr. 109, 112-117, 233-234, 237-238).

ARGUMENT

1. Petitioner contends (Pet. 12-24) that evidence of her conduct on September 17, 1982, when she provided the agents with a sample of cocaine, was merely proof of a prior bad act and was thus inadmissible under Fed. R. Evid. 404(b). This argument was properly rejected by the court below.

The indictment alleged and the evidence proved that the events of September 17th were overt acts in furtherance of the conspiracy to distribute cocaine.[1] At the September 17th meeting, petitioner initiated discussions on creating a marketing arrangement for an open-ended cocaine distribution scheme. Petitioner attempted to convince the agents to market cocaine in addition to heroin, and she promised to supply the cocaine for their distribution. She then gave

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[1]The indictment charged three overt acts: petitioner's September 17, 1982, meeting with the agents to discuss the distribution of cocaine and provide the agents with a sample; petitioner's two telephone calls of January 25 and 26 to discuss the impending sale; and distribution of cocaine by petitioner's husband in Cleveland on January 27, 1983 (Tr. 345-346).

the agents her telephone number if and when they decided to accept her deal. When they telephoned her in January, petitioner immediately remembered them as the heroin distributors and arranged for their requested cocaine to be delivered. Thus, it is clear that petitioner's actions on September 17th were in furtherance of the continuing conspiracy to distribute cocaine. As such, they were clearly admissible as proof of the conspiracy charge and were not barred by Fed. R. Evid. 404(b).[2]

2. Petitioner next maintains (Pet. 19-24) that she was prejudiced by the admission of a hearsay statement characterizing her as a "dope dealer." This claim is devoid of merit. The characterization occurred during petitioner's cross-examination of a government agent and, as the trial court and the court below both concluded (Pet. App. A2), was clearly elicited by petitioner's attorney. During cross-examination, the following colloquy occurred (Tr. 165):

> [Petitioner's counsel]: * * * Did you have any input as to how the initial meeting between [petitioner] and yourself was set up?
>
> [Government]: Objection.

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[2]Petitioner argues in addition (Pet. 15-18) that the court responded improperly to a question from the jury. Petitioner's claim is meritless. During deliberations, the jury asked the court: "In count number one under 'elements' there are three parts listed. The first part states that Rosa Darville possessed a narcotic controlled substance in count one of the indictment. Is that drug controlled substance Exhibit No. 1, or is it the alleged five kilos, or is it cocaine generally?" (Tr. 357). In its response, the trial court properly informed the jury, which evidently thought that it had to find that petitioner had actually possessed cocaine in order to convict on the conspiracy count, that Count 1 charged a conspiracy to distribute and to possess cocaine (Tr. 359). This instruction properly reminded the jury that the focus of their consideration should be whether or not petitioner conspired to distribute cocaine and not on any particular batch of cocaine.

> THE COURT: I think he can ask that question.
>
> [FBI agent]: I guess, yes.
>
> [Petitioner's counsel]: What was that input?
>
> [FBI agent]: [The informer] [a]dvised that a dope dealer was coming in on the 17th, would the FBI be interested, and I said yes.

Since petitioner's attorney elicited the remark and the prosecutor objected to the question, petitioner cannot now complain about the agent's responsive answer, which in view of the nature of the charge and the evidence was in any event unlikely to be prejudicial.

3. Petitioner argues (Pet. 24-29) that the trial court failed to make an explicit finding on the record that a conspiracy existed before admitting the out-of-court statements of an alleged co-conspirator. The court of appeals properly rejected this argument.

At trial, petitioner suggested that the court conditionally admit the co-conspirator statement and then make a finding on the record at some later point in the trial, in accordance with the Sixth Circuit's suggested procedure in *United States* v. *Vinson*, 606 F.2d 149 (1979), cert. denied, 444 U.S. 1074 (1980). However, when the trial judge was prepared to make an explicit finding that a conspiracy existed for the purpose of admitting the co-conspirators statements, petitioner inaccurately assured her that she had already ruled on the question. The following colloquy occurred (Tr. 264):

> THE COURT: My recollection is that I [made a ruling on independent evidence of a conspiracy] already at the side bar, and I hope that it is in the record somewhere * * *. But I believe back early on during the Government's case, I did rule that a conspiracy had been established sufficiently with objective facts so that

> under *Enright* and *Vinson* the hearsay evidence relating to co-conspirators' statements would be admissible. Do you have that recollection?
>
> [Petitioner]: Judge, I do because I at that time made an objection and you allowed us to note a continuing objection on the record.
>
> THE COURT: Right, I just wanted to be certain for the record that I had made that ruling already. Okay.

Under these circumstances, petitioner has no cause to complain about the absence of an express finding. In any event, as the court below observed (Pet. App. A4), the trial court implicitly made a finding that a conspiracy had been established by a preponderance of the evidence by submitting the case to the jury with the testimony of the co-conspirator in the record. See, *e.g., United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660 (3d Cir.), cert. denied, 449 U.S. 960 (1980).

4. Finally, petitioner contends (Pet. 29-36) that she did not receive effective assistance of counsel. This fact-bound argument was reviewed and rejected by the court of appeals under the correct legal standard. See Pet. App. A4-A5, citing *United States* v. *Cronic*, No. 82-660 (May 14, 1984); *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984). Further review by this Court is not warranted.[3]

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[3]Petitioner in hindsight may disagree with some of her trial attorney's tactical decisions, but she has utterly failed to show that he rendered constitutionally deficient representation. She complains (Pet. 30-33) about two remarks made by trial counsel in summation: reference to petitioner's failure to take the stand and to the "national drug problem." It is apparent that these remarks were made in an effort to respond to factors that counsel anticipated would independently occur to the jury and might influence them against petitioner. Counsel reminded the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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jurors (Tr. 313-314) that petitioner had no obligation to testify and that they were required to find her not guilty unless convinced beyond a reasonable doubt. Counsel also argued (Tr. 324-327) that the jurors should not convict petitioner based on their general hostility to drugs. These tactics were entirely reasonable, although other attorneys might have taken a different approach.

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